IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

WP(C).No. 34879 of 2005(B)

PETITIONER:

V.MOIDU, RETIRED HEADMASTER,
VEEROLI HOUSE, CHOMBALA P.O., KOZHIKODE.

BY ADV. SRI.KALEESWARAM RAJ

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY
SECRETARY TO GOVERNMENT, DEPARTMENT OF FINANCE,
SECRETARIAT, THIRUVANANTHAPURAM.

2. THE ACCOUNTANT GENERAL,
INDIA AUDIT AND ACCOUNTS DEPARTMENT,
OFFICE OF THE ACCOUNTANT GENERAL (A&E),
M.G.ROAD, THIRUVANANTHAPURAM.

3. THE ACCOUNTANTS OFFICER,
INDIAN AUDIT AND ACCOUNTS DEPARTMENT,
OFFICE OF THE ACCOUNTANT GENERAL(A&E),
M.G.ROAD, THIRUVANANTHAPURAM.

4. THE BRANCH MANAGER,
CENTRAL BANK OF INDIA, CHOMBALA BRANCH,
KOZHIKODE.

BY ADV. SRI.V.V.SIDHARTHAN
GOVERNMENT PLEADER SHRI.MOHAMMED FAZIL.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27.9.07 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P(C).No. 34879/05.

APPENDIX

PETITIONER'S EXHIBITS:

P1. COPY OF THE DISCHARGE SUMMARY FROM THE HOSPITAL DTD.18.3.02.

P2. COPY OF THE LETTER DTD.10.11.03.

P3. LETTER DTD.29.10.03 BY R4.

P4. COPY OF THE PENSION PAYMENT ORDER.

P5. COPY OF THE REPRESENTATION DTD.22.5.04 BEFORE R2.

P6. COPY OF THE JUDGMENT IN W.P.C.22516/04.

P7. COPY OF THE LETTER DTD.27.9.04.

P8. COPY OF THE LETTER DTD.9.3.05 BY R3.

P9. COPY OF THE GOVT. ORDER DTD.27.12.04.

P10. COPY OF THE LETTER DTD.26.9.05.

P11. COPY OF THE ORDER DTD.20.1.05 BY R4.

P12. COPY OF THE DOCUMENT NO.923/88 OF SRO. ALIYAR.

P13. COPY OF THE APPOINTMENT CARD FROM KOVAI MEDICAL CENTRE.

P14. COPY OF THE RECEIPT DTD.6.12.96.

P15. COPY OF THE PHOTO OF JAMEELA'S KHABER.

Sdk+

///True copy///

P.A. to Judge.

S.SIRI JAGAN, J.

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W.P.(C).No.34879 of 2005

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Dated this the 27th day of September, 2007

J U D G M E N T

The petitioner is a Mohammedan. He had two wives. One wife is still alive. The other wife was a teacher in an aided school. She died on 19.5.1996 after retirement on 30.4.1995. Pursuant to her death, family pension was being paid to the petitioner as the husband of the deceased employee. Now the petitioner is aggrieved by Ext.P9 order whereby it has been decided that payment of family pension of the petitioner was wrong in view of Rule 90(7)(a) of Part III of the Kerala Service Rules and the petitioner is liable to refund the pension already received. The petitioner is challenging Ext.P9 order primarily on the ground that Rule 90(7)(a) of part III of KSR, to the extent to which family pension is made inadmissible to a Muslim widower in respect of his deceased wife when another wife is living, is unconstitutional. The petitioner further seeks a declaration that he has a right to continue to receive family pension as the husband of late

Smt.Susheela and also challenges the recovery of the amounts already paid to him as family pension.

2. The 1st respondent has filed a counter affidavit refuting the contentions in the writ petition. On the strength of the counter affidavit, the respondents seek to sustain Ext.P9 order as well as Rule 90(7)(a) of the KSR.

3. I have considered the rival contentions in detail.

4. The primary argument of the petitioner revolves round the right of the petitioner as a Muslim to have more than one wife. He would submit that when his Personal Law permits him to have more than one legally wedded wife, and since in view of Article 13 of the Constitution of India, the State cannot make any law inconsistent with his Personal Law, Rule 90(7)(a) of the KSR is unconstitutional. He would further contend that the Supreme Court has time and again held that pension is the right of a Government servant and the same is property in the hands of the Government servant. Since the family pension is the property of his deceased wife, the petitioner has a right to succeed to such property of his wife, which cannot be taken away by the

impugned rule, the petitioner submits. Therefore, deprivation of family pension is deprivation of his right to property, which is prohibited under Article 31(1) of the Constitution of India. He would also contend that the impugned rule would violate his fundamental right under Article 19(1)(f). The next contention raised by the petitioner is that in so far as the family pension has already been paid to him without any misrepresentation or other fault on his part, it is patently unjust to recover the amounts already paid to him.

5. As far as the contention based on Article 13 is concerned, I am not inclined to accept the same since Article 13 prohibits only laws enacted in derogation of the fundamental rights. The petitioner's right under the Personal Law to have more than one wife is not a fundamental right recognised by the constitution. Even otherwise, Rule 90(7)(a) of KSR does not interfere with his right to have more than one wife and therefore, there is no violation of Article 13.

6. The contention that the right to family pension is the right to succeed to the property of his deceased wife does not

appeal to me. Reliance placed on the decision of ***State of Punjab and anr. v. Iqbal Singh*** (AIR 1976 SC 667) also appears to me to be misplaced. That decision only holds that pension is property under Article 31(1) and 19(1)(f) of a Government servant. Here, what is under consideration is family pension payable to the spouse on the death of the Government servant. That is a right of the spouse and not that of the Government servant, although it is in recognition of the service of the Government servant. Further, that is not an inheritable right of the Government servant. It is only a right conferred on the spouse of the government servant subject to the limitations prescribed under the Rules applicable. As such, I cannot countenance the contention of the petitioner that family pension is the property of the deceased Government servant and as such, the petitioner is entitled to receive family pension as of right and therefore, the State cannot make laws which would militate against his right under his Personal Law. The petitioner also raises a claim under Article 21. I do not think that Article 21 comes into the picture. Family pension is a benefit given to the

spouse of a deceased Government servant. That benefit can be claimed only in accordance with the rules of grant of such benefit. When grant of such benefit itself is subject to the conditions mentioned in the Rule, the petitioner cannot claim, as of right, that he is entitled to receive family pension sans the conditions prescribed by the Rules. In the above circumstances, I do not find any merit in the challenge against the constitutional validity of 90(7)(a) of Part III of KSR. Once the validity of the rule is upheld, then there cannot be any doubt that the petitioner is not entitled to family pension in view of the condition prescribed in Rule 90(7)(a).

7. Once it is held that the petitioner is not entitled to receive family pension at all, then the payment already made is under a mistake of law and therefore, going by the Division Bench decision of this court in ***Krishnakumar.S.P.*** *v.* ***Guruvayoor Devaswam and ors.*** [2007 (1) ILR Kerala, 699), as also other similar decisions payment made under a mistake can be recovered even when the employee has not contributed to the mistake. Therefore, I do not find any merit in the contention

that in view of the fact that the petitioner has not contributed to the mistake, the amounts paid under a mistake cannot be recovered from him.

In the above circumstances, I do not find any merit in the writ petition and accordingly, the same is dismissed.

Sd/-

sdk+ S.SIRI JAGAN, JUDGE

///True copy///

P.A. to Judge.